that each taxpayer can have different sources of income. The provisions of Part III provide for the treatment to be given for each of these sources. Different sources as provided by this Part are to be treated separately until the aggregate income is arrived at. The gross income of the respondent company for those periods is not in dispute. From this gross income adjustments have to be made as provided in Chapter 4.

Next we go to Chapter 5. It is only covered by section 42. It is to be observed from the wording of section 42 that statutory income is to be calculated from *each* source. The statutory income in respect of each source and if a taxpayer has more than one source then the statutory income must be computed from each source. Section 43(1)(a) also speaks of *each* of business sources consisting of a business indicating that a business income can have several sources. Section 43(1)(a) allows deductions which include unabsorbed losses to be deducted from *all* the taxpayer's *business* sources. However in the treatment of unabsorbed capital allowances it would appear that the Act allows such allowances to be given only to that particular source even if it is a business source. In other words capital allowances incurred for one business should never be taken into account when computing the income from another business source.

Section 42 of the Act provides that the statutory income of a person from a source for a year of assessment shall consist of an amount reduced by the amount of any *allowances* or the aggregate of the allowances falling to be made for that year under the schedule in relation to that source. The schedule that grants the allowances is schedule 3 in which paragraph 75 reads as follows: —

"75. Where, by reason of an insufficiency or absence of adjusted income of a person from a business of his for the basis period for a year of assessment or by reason of the existence of an adjusted loss from the business for that period, effect cannot be given or cannot be given in full to any allowance or to the aggregate amount of any allowances falling to be made to him for that year in relation to the source consisting of that business, that allowance or that aggregate amount, as the case may be, which has not been so made (or so much thereof as has not been so made to him for that year) shall be deemed to be an allowance to be made to him for the first subsequent year of assessment for the basis period for which there is adjusted income from that business, and so on for subsequent years of assessment until the whole amount of the allowance or that aggregate amount to be made to him has been made to him."

It is clear therefore from this paragraph that such allowances are given only to that source consisting of that business.

Paragraph 75 of schedule 3 of the Act is explicit in its distinction between "income from a business" and "income from a source consisting of that business". It would appear that paragraph 75 of schedule 3 is a special provision in the application of capital allowances. The contention of counsel for respondent company that paragraph 60 when read in conjunction with the definition of what is an "industrial building" in paragraph 63 of the schedule has no merit on the facts of this case. It is to be observed that the respondent company is still the "A.L.B. Co. Sdn. Berhad" although for the moment due to business difficulties it is engaged in granting licences to others for the use and occupation of their premises. In my view to avail itself to paragraph 60 of Schedule 3, the respondent company must also satisfy the second limb of sub-paragraph (c) of paragraph 63 of the Schedule that is, its business must consist or mainly consists of the hiring of storage space to the public. We cannot say that of the respondent company.

Applying paragraph 75 to the present case the capital allowances which were due to the respondent company only related to its tobacco business. Therefore the unabsorbed capital allowances cannot be taken into account in computing the incomes received from rental received by the respondent company. The order of the Commissioners is amended accordingly and the appeal is to that extent allowed.

There shall be no order as to costs.

Order accordingly.

Solicitors: *Skrine & Co.*

PIT STOP AUTO ACCESSORIES v. TAN KOCK SIANG; THE MINISTER OF COMMUNICATIONS (APPLICANT)

[O.C.J. (Ajaib Singh J.) May 30, 1974]
[Kuala Lumpur — Civil Suit No. 1191 of 1973]

Practice and Procedure — Writ of subpoena ad testificandum — Application to set aside — Writ not issued bona fide — Abuse of process of court — R.S.C., 1957, O.72 r.2.

In this case the Minister of Communications applied by way of summons-in-chambers that the writ of *subpoena ad testificandum* issued on behalf of the plaintiffs be set aside on the ground that the issue of the said writ was vexatious and an abuse of the process of the court.

The plaintiffs and the defendant in Civil Suit No. 1191 of 1973 were litigating over the terms of an agreement one of the clauses of which expressly stated that the agreement was conditional upon the coming into force of the law requiring the use of safety helmets by motor-cyclists and scooterists. The law had not at the time of the suit come into operation. The plaintiffs issued the writ of *subpoena ad testificandum* and served it on the applicant or his representative to give evidence on behalf of the plaintiffs as to why the law had not yet been introduced. The applicant in his affidavit in support of the application stated that:

(1) neither he nor any of the officials in his Ministry had any knowledge of the matters in Civil Suit No. 1191 of 1973 and were not in any position to give any relevant evidence;

(2) neither the applicant nor any of the officials in his Ministry was in a position to give evidence on matters relating to the policy or implementation of any law which matters are the collective responsibility of the Cabinet; and

(3) it is highly against the public interest to require any Minister or any public official to disclose to any person the policy and the implementation of any law prior to its publication as such disclosure would be detrimental to interests of the State.

The plaintiffs contended *inter alia* that the application was premature. The Minister should claim privilege from disclosing official matters at the appropriate time when giving evidence on behalf of the plaintiffs in the civil suit.

Held: (1) the Minister or his representative was in no position whatsoever to give relevant evidence in the dispute between the plaintiffs and the defendant. Whatever policy the Government may have in relation to safety helmets the plaintiffs' case against the defendant depended on the validity of the agreement between them based on facts which were not within the knowledge of the applicant or his representative;

(2) the writ in this case was not issued *bona fide* for the purpose of obtaining relevant evidence and its issue therefore was an abuse of the process of the court and it should be set aside.

Cases referred to:-

(1) *Ismail* v. *Hasnul; Abdul Ghafar* v. *Hasnul* [1968] 1 M.L.J. 108.

(2) *The King* v. *Baines & Anor.* [1909] 1 K.B. 258.

(3) *Broome* v. *Broome* [1955] 1 All E.R. 201.

CIVIL SUIT.

Lim Beng Choon (Senior Federal Counsel) for the applicant.

C. W. M. Abraham for the plaintiffs.

Ajaib Singh J.: This is an application by way of summons-in-chambers by the Minister of Communications, Tan Sri Haji Sardon bin Haji Jubir, for an order that the writ of *subpoena ad testificandum* issued on behalf of the plaintiffs in Kuala Lumpur High Court Civil Suit No. 1191 of 1973, commanding the said Minister or his representative to attend the High Court on 31st May, 1974, to give evidence on behalf of the plaintiffs, be set aside on the ground that the issue of the said writ of *subpoena ad testificandum* is vexatious and an abuse of the process of the court.

The circumstances under which the subpoena was issued and served upon the applicant may be briefly stated. The plaintiffs in Civil Suit No. 1191 of 1973 are Pit Stop Auto Accessories while the defendant is one Tan Kock Siang. In their statement of claim the plaintiffs aver that they had entered into an agreement with the defendant dated 14th February, 1973, whereby the plaintiffs were appointed the sole and exclusive agents for the distribution and sale of crash helmets manufactured by the defendant. The plaintiffs allege that the defendant has committed a breach of this agreement and they are suing the defendant for (i) a declaration that the written agreement dated 14th February, 1973, entered into between the plaintiffs and the defendant is valid, subsisting and binding, (ii) specific performance of the written agreement, (iii) an injunction restraining the defendant whether by himself or by his servants or agents or otherwise howsoever from parting or disposing of or selling any helmets otherwise than through the plaintiffs, (iv) damages in lieu of or in addition to specific performance, (v) special damages at the minimum rate of $15,000 per month and continuing and (vi) all necessary and consequential accounts and other relief.

The defendant, on the other hand, avers in his defence that by clause 2 of the agreement of 14th February, 1973, the validity of the agreement was conditional upon the law, requiring the use of safety helmets by motor-cyclists and scooterists, coming into force. The said clause 2 states that "This Agreement is subject to the coming into force of the law requiring the use of helmets by motor cyclists and scooterists (which law is hereinafter referred to as "the law"). In the event of the law not coming into force within a period of four (4) months from the date hereof this agreement shall determine and cease to have any further force or effect but such termination shall be without prejudice to any antecedent rights or liabilities of either party."

The Motor-Cycles (Safety Helmets) Rules, 1973, published on 27th February, 1973 (P.U. (A) 43) came into force on 1st March, 1973. Rule 4 of these Rules makes it compulsory for a person, other than a person exempted under rule 5, who drives or rides on a motor-cycle on a road to wear a safety helmet on his head. However, by the Motor-Cycles (Safety Helmets) (Amendment) Rules, 1973, published on 19th April, 1973 (P.U. (A) 99) and deemed to have come into force on 1st March, 1973, it was provided that rule 4, which required the compulsory use of safety helmets, shall come into force on such date as the Minister may by notification in the Gazette appoint. Both the Motor-Cycles (Safety Helmets) Rules, 1973 and the Motor-Cycles (Safety Helmets) (Amendment) Rules, 1973, were made by the Minister of Communications in exercise of the powers conferred upon him by section 73 of the Road Traffic Ordinance, 1958.

In view of these facts the defendant avers in his defence that since the condition precedent to the validity of the agreement of 14th February, 1973, had not materialised the said agreement was, and is, null and void.

By notice dated 27th February, 1974, the Senior Assistant Registrar of the High Court at Kuala Lumpur informed the solicitors for the plaintiffs and for the defendant that Civil Suit No. 1191 of 1973 was fixed for hearing on 31st May, 1974. On 21st May, 1974, the solicitors for the plaintiffs issued a *subpoena ad testificandum* for the attendance of the Minister of Communications or his representative to give evidence on behalf of the plaintiffs. This subpoena was served on the Minister on 22nd May, 1973, together with a covering letter of even date addressed to the Minister by the plaintiffs' solicitors. The covering letter stated that the evidence required by the plaintiffs from the Minister or his representative pertained to the Motor-Cycles (Safety Helmets) Rules, 1973, and on policy, namely, as to why the law pertaining to crash helmets had not yet been implemented.

In support of his application to set aside the subpoena the applicant has filed an affidavit dated 25th May, 1974. In that affidavit the applicant states that neither he nor any of the officials in his Ministry has any knowledge whatsoever of the matter in Civil Suit No. 1191 of 1973 either personally or in their official capacity and that they are, therefore, in no position to give any relevant evidence in the civil suit. The applicant further refers to the covering letter of 22nd May, 1974, addressed to him by the plaintiffs' solicitors and states that neither he nor any of the officials in his Ministry is in a position to give evidence on matters relating to the policy and/or the implementation of any law which matters are the collective responsibility of the Cabinet and that, in any event, it is highly against the public interest to require any Minister or any public official to disclose to any person the policy and the implementation of any law prior to its publication as such disclosure will be detrimental to the State.

Mr. Lim Beng Choon, Senior Federal Counsel, appearing on behalf of the Minister of Communications, referred to the applicant's affidavit and submitted that the Minister had no knowledge of any fact in Civil

Suit No. 1191 of 1973 and was, therefore, in no position to give relevant evidence. On the question of the policy of the Government and the implementation of any law he submitted that such matter would be the collective responsibility of the Cabinet and that the disclosure of policy matters leading to an enactment of a law would be against the public interest. He referred to the legislation of tax matters as an example and suggested that premature disclosure thereof would be undesirable and detrimental to the State. In answer to a question from the Bench, Mr. Lim Beng Choon said that the Minister was not, at the moment, claiming privilege under section 123 of the Evidence Act, 1950, but may do so at some later stage if the need arose.

In opposing the application Mr. C. Abraham for the plaintiffs in Civil Suit No. 1191 of 1973 conceded that the Minister of Communications or his representative had no knowledge of the facts in the civil suit. He submitted that the evidence which the plaintiffs required from the Minister or his representative was not as to when the law relating to the compulsory use of safety helmets would be implemented but the reason why the implementation of that law had been deferred. Mr. Abraham referred to the pleadings in the civil suit and in particular to the agreement of 14th February, 1973, entered into between the plaintiffs and the defendant and said that it was important for his clients' case to know the policy of the Ministry of Communications regarding the deferment of the law relating to the compulsory use of safety helmets because that policy may have influenced the defendant to break his contract with the plaintiffs. Mr. Abraham quoted section 9 of the Evidence Act, 1950, and submitted that the intention of the parties in relation to their agreement of 14th February, 1973, being of paramount importance, the policy of the Ministry of Communications which led to the deferment of the law relating to the compulsory use of safety helmets would be a necessary fact to explain or introduce relevant facts in the civil suit.

Mr. Abraham further submitted that the application by the Minister of Communications to set aside the subpoena served on him was premature. The Minister or his representative, he said, should claim privilege from disclosing official matters at the appropriate time when giving evidence on behalf of the plaintiffs in the civil suit.

The writ of *subpoena ad testificandum* is issued in the High Court by the authority of the Chief Justice in the name and on behalf of His Majesty the Yang Di-Pertuan Agung and it is in the form of a command to the person named in the subpoena to attend court at such time and date as may be stated therein. It is the privilege of any party in civil proceedings in the High Court to issue and serve a subpoena on any person to give evidence on his behalf. Ministers of His Majesty's Government are not, by virtue of their office, exempt from service of a subpoena. As was observed by Tan Sri Raja Azlan Shah J. (as he then was) in the case of *Ismail* v. *Hasnul; Abdul Ghafar* v. *Hasnul*[1] "a subpoena may be issued against anybody, be he a Minister of the Government or a nonentity. It cannot be gainsaid that a Minister has any more privilege than that enjoyed by a member of the public".

The court, however, has jurisdiction to exercise control over the privilege of parties in civil proceedings in the High Court to issue and serve subpoenas and, in order to prevent an abuse of this privilege, the court will not hesitate to set aside the subpoena if it is shown to the satisfaction of the court that the subpoena was not issued for the purpose of obtaining relevant evidence. In the case of *The King* v. *Baines & Anor.*,[2] Herbert Henry Asquith and Herbert John Gladstone, the Prime Minister and Home Secretary, respectively, had applied by rule nisi in the King's Bench Division of the High Court of Justice in England, calling upon the defendants Jennie Baines and Alfred Kitson to show cause why the subpoenas served on them commanding them to appear and testify at the assizes then being held at Leeds upon the trial of an indictment against the defendants Baines and Kitson for breach of the peace and unlawful assembly, should not be set aside on the ground that their issue was an abuse of the process of the court. The facts, briefly stated, as they appear in the record, were that on 10th October, 1908, the applicants were present at a meeting held in the Coliseum, a hall in Leeds. They were seated on the front of a platform and were about sixty feet away from closed doors forming the entrance from a street called Cookridge Street into the hall. The doors had glass panels in them. The charge against the defendants was that they with other persons unlawfully assembled in Cookridge Street and there committed other like offences during the meeting. The defendants suggested that the applicants saw from the position they occupied on the platform what was going on in Cookridge Street, and that they must have heard what was said in the street.

Both the applicants swore affidavits to the effect, *inter alia*, that they were wholly unable to give any evidence which could possibly be relevant to any issue which could arise upon the trial of the defendants as the offences charged in the indictment related to matters alleged to have taken place in a certain street in Leeds at a time when they were in a building known as the Coliseum in that town.

In making the rule absolute, Bigham J. had this to say: —

> "I am of opinion that this rule must be made absolute. There can be no doubt as to the jurisdiction of the court to interfere where it is satisfied that its process is being used for indirect or improper objects. It must not be supposed that the position which the applicant occupy affords them any privilege. They stand in the same position as any other of His Majesty's subjects. But the court has to inquire whether its process has been issued against them with the object and expectation on reasonable grounds of obtaining from them evidence which can be relevant."

Having considered all the facts and circumstances in this application and the submissions advanced on behalf of the parties, I have come to the conclusion that the writ of *subpoena ad testificandum* served upon the Minister of Communications ought to be set aside. In my judgment, the Minister or his representative is in no position whatsoever to give relevant evidence in Civil Suit No. 1191 of 1973. That suit is centred around a written agreement entered into between the plaintiffs and the defendant. The Minister of Communications or any official from his Ministry can in no way give relevant evidence as to the facts in issue in the civil

suit or as to any collateral facts. Learned counsel for the plaintiffs submitted that the reason as to why the law relating to the compulsory use of safety helmets had been deferred was relevant evidence and very important to the plaintiffs' case. With respect, I fail to see any relevancy of this evidence to the plaintiffs' claim against the defendant. Whatever policy the Government may have in relation to safety helmets the plaintiffs' case against the defendant depends on the validity or otherwise of the agreement of 14th February, 1973, the facts of which, on the own admission of counsel for the plaintiffs, are not within the knowledge of the Minister of Communications or his representative.

In his submission, Mr. Abraham cited the case of *Broome* v. *Broome*[3] where the application to set aside a *subpoena ad testificandum* had failed. That case, in my view, is of no help to the plaintiffs in their opposition to the present application before me. *Broome* v. *Broome* was a divorce suit wherein the wife had petitioned for divorce on the ground of her husband's cruelty. The application to set aside a subpoena ad testificandum served on one Mrs. Allsop was rejected by Sachs J. The issue before the court in that case was whether the claim of crown privilege in respect of the witness Mrs. Allsop should be upheld, but it is abundantly clear from the judgment of Sachs J. that Mrs. Allsop was in fact in a position to give relevant evidence in the divorce suit.

I am satisfied that the writ of *subpoena ad testificandum* issued against the Minister of Communications is misconceived. It was not issued *bona fide* for the purpose of obtaining relevant evidence and its issue, therefore, is an abuse of the process of the court. The subpoena is set aside. Costs of the proceedings to the applicant.

Order accordingly.

Solicitors: *Shearn, Delamore & Co.*